

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000471-MR

CLIFFORD COLEMAN and JUSTINE COLEMAN

APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 08-CI-00463

ROGER ELSTER FORD and
ROSE ANN FORD

APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Clifford and Justine Coleman (Appellants Coleman)

appeal from the January 26, 2010, Summary Judgment of the Pike Circuit Court.

That judgment granted summary judgment to Roger Elster and Rose Ann Ford, and

found that a passway across the Ford's property was a temporary restrictive

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

covenant that did not transfer with the land. On appeal, Appellants Coleman argue that the trial court incorrectly applied the law of restrictive covenants. They maintain that the passway is an easement appurtenant to the Ford's property and, therefore, the proper application of law would have been that which is applicable to the reservation of easements. Because we hold that an easement appurtenant was created, we hold that the Appellants Coleman are entitled to judgment on their claim. Accordingly, we reverse with instructions to the trial court to enter judgment in favor of the Appellants.

The Appellants Coleman and the Fords are owners of properties that are adjacent to one another and that were once owned as one parcel by Thomas and Sadie Coleman (the Thomas Colemans). By deed dated April 8, 1971, the Thomas Colemans sold a portion of the property, the tract now owned by the Fords, to Clarence Coleman and his wife (the Clarence Colemans). The property is located on one side of a creek, which runs parallel to a paved roadway on the opposite side of the creek from the property. The deed which transferred the property to the Clarence Colemans contained the following provision: “[t]here is reserved in this conveyance a twelve foot passway running alongside the creek and throughout the entire length of the property.” The Clarence Coleman property was subsequently acquired by Archie and Rita Blackburn, by deed dated December 5, 1995; and then the Fords, by deed dated June 28, 2001. Neither the 1995 deed to the Blackburns

nor the 2001 deed to the Fords mentions the passway that was reserved in the 1971 deed.

The remainder of the Thomas Coleman property was acquired by Appellants Coleman by deed dated August 13, 2007. That property is also located on the opposite side of the creek from the paved roadway. Appellants Coleman's deed does not contain, by reference or otherwise, mention of the passway that was reserved in the 1971 deed. Prior to their purchase of the remaining Thomas Coleman property, Appellants Coleman owned an adjoining piece of property that they used for their garden. That piece of property was accessible via a concrete drain pipe that the Appellants Coleman placed in the creek.

After their 2007 acquisition of the remainder of the Thomas Coleman property, Appellants Coleman sought to use the twelve-foot passway reserved in the 1971 deed from the Thomas Colemans to the Clarence Colemans for the purpose of gaining access to their property. The Fords denied Appellants Coleman's use of the passway. Appellants Coleman filed a complaint with the Pike Circuit Court seeking to enforce the language in the 1971 deed. Both parties filed motions for summary judgment, and on January 26, 2010, summary judgment was entered in favor of the Fords. This appeal followed.

Our standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law. CR²

² Kentucky Rules of Civil Procedure.

56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary “judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances.” *Id.* “Only when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted.” *Id.* at 482.

As we have already noted, the Appellants Coleman’s main contention on appeal is that the trial court erred when it relied on the law of restrictive covenants as opposed to the law applicable to the reservation of easements. In order to best address the Appellants Coleman’s argument, we must first examine the difference between restrictive covenants and easements.

A restrictive covenant is defined as a “[p]rovision in a deed limiting the use of the property and prohibiting certain uses.” *Black’s Law Dictionary* 1315 (6th ed. 1990). *Black’s* goes on to state:

In context of property law, term describes contract between grantor and grantee which restricts grantee’s use and occupancy of land; generally, purpose behind restrictive covenants is to maintain or enhance value of lands adjacent to one another by controlling nature and use of surrounding lands.

Id. “Kentucky has approached restrictive covenants from the viewpoint that they are to be regarded more as a protection to the property owner and the public rather than as a restriction on the use of property, and that the old-time doctrine of strict

construction no longer applies.” *Colliver v. Stonewall Equestrian Estates Ass'n, Inc.*, 139 S.W.3d 521 (Ky. App. 2003), quoting *Highbaugh Enterprises Inc. v. Deatruck and James Construction Co.*, 554 S.W.2d 878, 879 (Ky. App. 1977).

An easement, on the other hand, is defined as “[a] right of use over the property of another.” *Black’s Law Dictionary* 509 (6th ed. 1990). “An easement may be created by express written grant, implication, prescription or estoppel.” *Loid v. Kell*, 844 S.W.2d 428, 429 (Ky. App. 1992). “In contrast to a restrictive covenant that restricts the use and enjoyment of property, an easement confers a right upon the dominant tenement to enjoy a right to enter the servient tenement.” *Dukes v. Link*, 315 S.W.3d 712, 715 (Ky. App. 2010). Furthermore, an easement can either be in gross or appurtenant.

[A]n easement in gross is a mere personal interest in or right to use the land of another. It is attached to and vested in, the person to whom it is granted. In fact, the principal distinction between an easement in gross and an easement appurtenant is that in the first there is not, and in the second there is, a dominant tenement to which it is attached.

Meade v. Ginn, 159 S.W.3d 314, 320 (Ky. 2004)(citation omitted). “An easement appurtenant inheres in the land and cannot be terminated by an act of the parties (for example, abandonment, merger, or conveyance) or by operation of law, as in the case of forfeiture or otherwise.” *Dukes v. Link*, 315 S.W.3d at 715 (citation omitted).

In addition to restrictive covenants and easements having distinct effects upon a piece of property, they can be further distinguished by the manner in which

they become permanent. In order to ascertain whether a restrictive covenant is of a limited or perpetual duration, the courts have traditionally looked to the intention of the parties by which it was created. *Id.* Furthermore, when there is doubt as to the duration of the restriction, that doubt will be construed *against* the party claiming the restriction to be perpetual and in favor of free use of the property. *Glenmore Distilleries Co. v. Fiorella*, 273 Ky. 549, 117 S.W.2d 173 (1938). “ In order to confer such a right upon one not a party to the agreement, it must appear that it was the intention of the covenantee to create a servitude or right which should run with the land.” *Bagby v. Stewart's Ex'r*, 265 S.W.2d 75, 76 (Ky. 1954). The most common way this is done is by identifying the restriction as being applicable to the grantor’s assigns. *See, e.g., Salisbury v. Columbian Fuel Corp.*, 387 S.W.2d 864 (Ky. App. 1965).

In contrast, “the recording of the instrument that grants an easement by a common grantor binds a subsequent purchaser of the tract burdened by the easement *regardless of whether it is included in the purchaser's deed.*” *Dukes v. Link*, 315 S.W.3d 712, 717 (Ky. App. 2010)(emphasis added). Therefore, if the language in the original deed from the Thomas Colemans to the Clarence Colemans created an easement, then the Appellants Coleman would be entitled to a judgment in their favor.

In its order granting summary judgment to the Fords, the trial court applied the law of restrictive covenants and found that in order to be enforceable against the Fords, the language in the deed to the Clarence Colemans should have included

a time period or duration. We do not agree. In support of its decision, the trial court relied heavily on the fact that the Appellants Coleman had access to their property via the adjoining lot that contained the concrete drain pipe. However, such facts are irrelevant. Instead, the relevant facts are those that existed at the time the passway was reserved. Specifically, the undisputed facts among the parties are that the passway served as the only access to the Thomas Coleman's remaining property at the time they conveyed the Ford Parcel to the Clarence Colemans. Furthermore, the use of the word "reserve" in the deed indicates to this Court that the Thomas Colemans intended to purposefully reserve the passway for the use and benefit of their remaining property, the dominant estate. See *Dukes v. Link, supra*. As such, it is clear to this Court that an easement appurtenant was created, with the property of the Appellants Coleman being the dominant tenement to which it attached. Per KRS³ 381.150, a party can only convey that which was originally conveyed to them. Accordingly, the Clarence Coleman's conveyance was subject to the dominant estate's right to the passway, which continues to this day. That the reservation was not noted in subsequent deeds is irrelevant, as an easement appurtenant passes to all subsequent grantees "regardless of whether it is included in the purchaser's deed." *Dukes v. Link*, 315 S.W.3d at 717 (Ky. App. 2010). Accordingly, the Fords were not entitled to summary judgment as a matter of law and, having determined that an easement appurtenant was created and exists in favor of Appellants Coleman, the case is reversed and remanded to the Pike

³ Kentucky Revised Statutes.

Circuit Court with instructions to enter a new judgment in favor of the Appellants

Coleman.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT
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BRIEF AND ORAL ARGUMENT
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